



Hamptons Hospital Limited v Cibien Engineering & Construction Company Limited & another (Civil Appeal E049 of 2024) [2024] KEHC 6308 (KLR) (3 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E049 OF 2024
RN NYAKUNDI, J
JUNE 3, 2024**

BETWEEN

HAMPTONS HOSPITAL LIMITED APPELLANT

AND

**CIBIEN ENGINEERING & CONSTRUCTION COMPANY LIMITED 1ST
RESPONDENT**

TUMAZ & TUMAZ ENTERPRISES LIMITED 2ND RESPONDENT

RULING

1. Before me for determination is an application by way of Notice of Motion dated 15th March, 2024. The application is expressed to be brought under the provisions of Article 159(2)(d) of the *Constitution of Kenya*, 2010, Section 1A, 1B, 3A, 3, 63(e) of the *Civil Procedure Act*, order 22 rule 22 and order 42 rule 6 of the *Civil Procedure Rules*, 2010. The application seeks the following reliefs:
 - a. Spent
 - b. That pending the hearing and determination of this application, the court be pleased to order stay of execution of the ruling dated 14th March, 2024 and all the consequential orders arising therefrom.
 - c. Spent
 - d. That the costs of this application be in the cause.
2. The application is premised on seven (7) substantive grounds and a supporting affidavit sworn by on Edwin Shisanya, an Advocate of the High Court of Kenya. The grounds are as follows:
 - a. On 14th March, 2024, the subordinate court (Hon. Keyne Odhiambo Gweno SRM) delivered a ruling dismissing the appellant's application that sought to raise the proclamation and/or



attachment of the objector's goods as proclaimed by Eshikoni Auctioneers in Execution of the decree dated 17/7/2019 vide proclamation notice dated 01.11.2023.

- b. Dissatisfied with the said decision, the Appellant/Applicant has preferred an arguable appeal with high chances of success before this court and applied for certified copies of proceedings, the order and ruling.
 - c. That the Respondent will at any time attach the goods if the Appellant herein as there is no stay in place to the detriment of the Appellant who is a stranger in the lower court proceedings for the Appellant is not a party to the said proceedings and as a result expose the Appellant to irreparable loss and prejudice.
 - d. That unless this application is urgently heard and the stay of execution orders granted in the interim, the Respondent will at any time instruct auctioneers to proceed with impugned execution thereby rendering the Appellant's/Applicant's instant appeal nugatory and the Appellant will suffer substantial loss and prejudice as the Respondent has no known attachable assets hence cannot refund the value of the attached goods herein.
 - e. That the Applicant has an arguable appeal with high chances of success and seeks an opportunity to be allowed to ventilate its appeal before this court.
 - f. That the application has been made without inordinate delay.
 - g. That the Applicant is willing to abide by any just orders to protect the interest of the Respondent.
3. The Applicant herein Hamptons Hospital Limited was an objector to attachment and sale of movable property in execution of decree in Eldoret CMCC E013 of 2019. Vide an application dated 17.11.2023, it sought from the trial court an order to raise the proclamation and/or attachment of the listed items proclaimed by Eshikoni Auctioneers in execution of the decree dated 17.7.2019. The applicant herein further sought to have the proclaimed items released to it. It contended that it's a stranger to the proceedings, the good proclaimed belonged to it and not the 2nd Respondent. That the proclamation was unlawful for being contrary to rules 6(f) and 12(b) of the [Auctioneer Rules](#), and that the proclaimed items are its tools of trade.
 4. The 1st Respondent in response filed grounds of opposition and maintained that the objector had not demonstrated that it was the legal owner of the proclaimed goods or shown that it had an equitable interest in the proclaimed items.
 5. The trial court in its finding established that the objector, a limited liability company, was not protected by the provisions of section 44(1) of the [CPA](#). The court found that the objector failed to establish ownership of the attached goods, and therefore, the objection was dismissed. On 14th March, 2024 when the ruling was delivered, counsel for the objector stated that he inadvertently did not attend court and therefore he was unable to seek thirty days stay of execution.
 6. Curiously, the court has noted that the applicant did not attach a draft Memorandum of Appeal for the court to ascertain that the appeal is indeed arguable. The substantive order sought by the applicant is that of stay of execution of the ruling dated 14th March, 2024 pending the hearing and determination of this application.
 7. I resist the temptation of delving into the impugned ruling and determine its appropriateness because as it stands, I have not seen any memorandum of appeal. I shall therefore focus on the present application seeking stay of execution.



Determination

8. The principles guiding the grant of a stay are well settled, and provided under Order 42 Rule 6 of the [Civil Procedure Rules](#), which provide as follows:

Subrule (1) unless –

- (a) The court is satisfied that substantial loss may result to the applicant unless the order is made that the application has been made without unreasonable delay; and
- (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him been given by the applicant

9. Further, stay may be granted for sufficient cause, and in deciding whether or not to grant the stay, the court ought to consider the overriding objectives stipulated under Sections 1A and 1B of the [Civil Procedure Act](#) – being the just determination of proceedings, and efficient disposal of the business of the court, by use of the available judicial and administrative resources and timely disposal of all other proceedings in the court, by use of the available judicial and administrative resources and timely disposal of all other proceedings in the court at a cost affordable by the respective parties.

10. This court in exercising its discretion will always opt for the lower, rather than the higher risk of injustice. The court in the case of [Suleiman v Amboseli Resort Limited](#) [2014] eKLR stated as follows:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under order 20 rule 6 [Civil Procedure Rules](#).”

11. The Court of Appeal in [Samrir Trustee Limited v Guardian Bank Limited](#); Civil Appeal 235 of 1999; [2000] KECA 356 (KLR) Nairobi Milimani HCCC No. 795 of 1997, rendered that:

“every aggrieved party has a natural and undoubted right to seek the intervention of the court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant ... but the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment; hence the consequence factor to bear in mind is that it has defined the rights of a party with definite conclusion.”

12. For an order of stay to issue, it is required of the applicant to satisfy the court of the substantial loss to be suffered. It is not enough to just state it. The applicant ought to move step further adduce documentary or empirical evidence to support the assertion. The nature however of the present proceedings is that of an objector who is not a party to the proceedings. He is of the opinion that he will be prejudiced or be exposed to irreparable loss and prejudice.

13. In the [Tropical Commodities Supplies Ltd & others v International Credit Bank Limited \(in Liquidation\)](#) [2004] EALR 331, the Court of Appeal rendered that;

“... substantial loss does not represent any particular mathematical formula, rather, it is a quantitative concept. It refers to any loss, great or small, that is of real worth or value and as distinguished from a loss without value or loss that is merely nominal...”



14. It is at the court's discretion to issue an order of stay. The said order should not cause unnecessary suffering to either of the parties, rather, the court recognized the fact that both parties have rights that ought to be safeguarded, guided by the overriding principle under Section 1A and 1B of the Civil Procedure Act; that anchors substantive justice as a principle of justice as stated under the Constitution, Article 159(2)(d).
15. A glance at the instant case and the ruling delivered by the subordinate court reveals that the applicant disputes the attachment of his property in satisfaction of a decree dated 17/17/2019. The arguments that were advanced at the subordinate court were largely that he is a stranger to the proceedings, the proclaimed goods belonged to it and not the 1st Respondent herein.
16. In the persuasive case of Calvin Green v Wynlee Trading Ltd and Naylor & Turnquest (2010) JMCA, the import of the case is that a successful litigant ought not to be deprived of the fruits of his/her judgment. Thus,

“The threshold question on any such application is of course, whether the material provided by the parties discloses at this stage an appeal with ‘some prospect of success’ (per Harrison JA in *Watersports Enterprises*, supra para 8). Once that criterion has been met, the next step is for the court to consider whether as a matter of discretion, the case is a fit one for the granting of a stay. In this regard, the overriding consideration is well expressed in the judgment of Clarke LJ (as he then was) in *Hammond Suddard* (at para. 22)

Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or the other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?”

17. Likewise in *Swain v Hillman* (2001) 1 ALL ER 91, Lord Woolf stated thus:

“This court has on more than one occasion accepted that the words ‘a real chance of success’ in rule 1.8(9) of the *CAR* equivalent to our Order 42 Rule 1 of the *CPR* are to be interpreted to mean that the applicant for leave must show that there is a realistic as opposed to a ‘fanciful’ prospect of success.’ So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be granted, he will have a realistic chance of success in his substantive appeal.”

18. Having done a careful analysis of the facts of the case and the material available on record, I am of the opinion that the applicant should be allowed to ventilate his appeal before this court determines the appropriateness of the impugned ruling. The resultant is that the applicant is hereby granted an order of stay of execution of the ruling delivered on 14th March, 2024.
19. In order to Fast Track the appeal process, I make an order that the Applicant/Appellant file the intended appeal and Record of Appeal within 30 days of this ruling.
20. It is so ordered.

SIGNED DATED AND DELIVERED VIA E-MAIL AT ELDORET ON THIS 3RD DAY OF JUNE 2024



R. NYAKUNDI
JUDGE

